Supreme Court, U.S.
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No. 97-1064

In the Supreme Court of the United States

OCTOBER TERM, 1997

MARK E. MADDEN, PETITIONER

v.

TOGO D. WEST, JR., ACTING SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
SHARON Y. EUBANKS
JOHN J. HOFFMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

17 pp

QUESTION PRESENTED

Whether any evidence submitted by a veteran showing manifestation of disability within one year after service is necessarily sufficient to establish the presumption of service connection under 38 C.F.R. 3.307(b).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Ascherl v. *Brown*, 4 Vet. App. 371 (1993)	9
Cartright v. *Derwinski*, 2 Vet. App. 24 (1991)	9
Cuevas v. *Principi*, 3 Vet. App. 542 (1992)	9
Del Veccio v. *Bowers*, 296 U.S. 280 (1935)	11
Gilbert v. *Derwinski*, 1 Vet. App. 49 (1991)	8, 9
Grant v. *Shalala*, 989 F.2d 1332 (3d Cir. 1993)	13
Grottveit v. *Brown*, 5 Vet. App. 91 (1993)	10
Inwood Labs., Inc. v. *Ives Labs., Inc.*, 456 U.S. 844 (1982)	7
Jensen v. *Brown*, 19 F.3d 1413 (Fed. Cir. 1994)	10
Kerner v. *Flemming*, 283 F.2d 916 (2d Cir. 1960)	11
Layno v. *Brown*, 6 Vet. App. 465 (1994)	9
Meehan Seaway Serv. Co. v. *Director, OWCP*, 125 F.3d 1163 (8th Cir. 1997), petition for cert. pending, No. 97-1032	12
Pietrunti v. *Director, OWCP*, 119 F.3d 1035 (2d Cir. 1997)	12
Schaal v. *Apfel*, Nos. 96-6212 & 96-6316, 1998 WL 21886 (2d Cir. Jan. 23, 1998)	12
Underwood v. *Elkay Mining, Inc.*, 105 F.3d 946 (4th Cir. 1997)	12
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)	12

Statutes, regulations and rule: Page

38 U.S.C. 101(16) 2
38 U.S.C. 1101 2
38 U.S.C. 1110 2
38 U.S.C. 1112(a) 2
38 U.S.C. 1131 2
38 U.S.C. 1137 2
38 U.S.C. 1153 10
38 U.S.C. 1154 10
38 U.S.C. 1154(b) 10
38 U.S.C. 5107(b) 8, 9
38 U.S.C. 5108 3
38 U.S.C. 7104(a) 3
38 U.S.C. 7104(b) 3
38 U.S.C. 7251 3
38 U.S.C. 7252 3
38 U.S.C. 7261(a)(4) 7
38 U.S.C. 7292(a) 5
38 U.S.C. 7292(d)(2) 5
38 C.F.R.
Section 3.303(a) 2
Section 3.307(b) 2, 5, 6, 10
Section 20.1103 3
Section 20.1105 3
Fed. R. Civ. P. 52(a) 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 125 F.3d 1477.[1] The opinion of the Court of Veterans Appeals (Pet. App. 12-21) is unreported. The opinion of the Board of Veterans' Appeals (Pet. App. 22-34) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1997. The petition for a writ of certiorari was filed on December 29, 1997 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The case caption has been changed to reflect that Togo D. West, Jr., is now Acting Secretary of Veterans Affairs.

STATEMENT

1. A veteran who has a disability "resulting from personal injury suffered or disease contracted in line of duty" is entitled to federal disability benefits. 38 U.S.C. 1110, 1131. A disability is "service-connected" if it "was incurred or aggravated * * * in line of duty in the active military, naval, or air service." 38 U.S.C. 101(16). A veteran may demonstrate his disability's service connection either "by affirmatively showing inception or aggravation during service or through the application of statutory presumptions." 38 C.F.R. 3.303(a). One of those statutory presumptions provides that, for certain chronic conditions, including psychoses, if the condition becomes manifest to a degree of ten percent or more within one year from the date of separation from service, the condition is presumed to have been incurred in service. 38 U.S.C. 1101, 1112(a), 1137. A veteran may establish that a disease manifested itself within the required time period by "medical evidence, competent lay evidence or both." 38 C.F.R. 3.307(b).

2. a. Petitioner served on active military duty in the Army from March 1973 to March 1976. Pet. App. 13, 23. In June 1983, a Veterans Administration (now Department of Veterans Affairs) (VA) regional office denied petitioner's claim for service connection for a lower back injury, liver disease secondary to alcoholism, and a nervous condition. *Id.* at 13.

Petitioner attempted to reopen the claim in March 1987. Pet. App. 13, 23. In September 1987, the VA regional office again denied the claim. *Ibid.* After petitioner testified at a personal hearing, the regional office denied the claim again in February 1990. *Id.* at 14. Petitioner appealed to the Board of Veterans'

Appeals (Board),[2] which denied the appeal in November 1991. *Id.* at 15, 23. Petitioner then appealed to the Court of Veterans Appeals,[3] which remanded the claim to the Board. *Id.* at 15, 24. In January 1994, the Board remanded the case to the regional office to obtain medical records. *Ibid.*

b. In an August 16, 1994 decision, the Board found that petitioner had submitted new and material evidence meriting reopening of the claim[4] but denied the claim because petitioner had not presented credible evidence of a psychiatric disorder during service or within one year following his discharge. See Pet. App. 30, 33. Petitioner presented three new pieces of evidence: "his own lay testimony that his psychiatric condition stemmed from a back injury incurred during service, the pain from which accounted for his alcohol and drug abuse, which fueled his psychiatric difficulties," (*id.* at 2), and two documents written by a physician on April 23, 1990, nearly 14 years after his alleged hospitalization for a psychiatric disorder. The first of those documents was a set of notes taken by the physician summarizing a conversation with petitioner in which the physician stated that he had "a strong feeling [that petitioner]

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[2] The Board is the division within the VA responsible for deciding appeals from decisions on claims for veterans benefits. 38 U.S.C. 7104(a).

[3] Established in 1988, the Court of Veterans Appeals has exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. 38 U.S.C. 7251, 7252.

[4] Following a final decision by the Board or where a regional office decision becomes final in the absence of a timely appeal, a claim may be reopened only upon submission of new and material evidence. See 38 U.S.C. 5108, 7104(b); 38 C.F.R. 20.1103, 20.1105.

may have been [his] patient" at the Fort Lyon VA hospital from October 9, 1976 to December 9, 1976. *Id.* at 3. The second document was a note dated the same day stating that petitioner "[w]as on a Psychiatric Unit for the following hospitalization" from "10/9/76 to 12/9/76." *Ibid.* "[T]he resolution of [petitioner's] claim," the Board explained, "hinges on [his] hospitalization in the fall of 1976, shortly after he left military service." *Id.* at 31. After reviewing all the evidence, new and old, the Board concluded:

> [T]he record does not reflect the nature and severity of any psychiatric illness treated while [petitioner] was on a VA psychiatric unit in late 1976. Rather the available evidence provided by [petitioner] contemporaneous with the event reveals only that he was in the process of detoxification for alcohol abuse during that 1976 period of hospitalization. [Petitioner's] verifiable medical history demonstrates only alcohol abuse during service, and no indication of any identifiable psychiatric disorder until 1982, approximately six years after service.

Id. at 32-33.

c. The Court of Veterans Appeals (CVA) affirmed the Board's decision. Relying on the principle that "determination of credibility is a finding of fact function reserved for the [Board,]" the CVA found the Board's findings possessed "a plausible basis in the record." Pet. App. 20-21. On August 12, 1996, the CVA denied a motion for panel review.

d. The Court of Appeals for the Federal Circuit affirmed the CVA's decision. Interpreting petitioner's appeal liberally, the Federal Circuit viewed the appeal as challenging the Board's and the

CVA's interpretation of 38 C.F.R. 3.307(b).[5] That regulation, which establishes the evidentiary standards for claims of service connection, provides in pertinent part:

> *Evidentiary basis.* The factual basis may be established by medical evidence, competent lay evidence or both. Medical evidence should set forth the physical findings and symptomatology elicited by examination within the applicable period. Lay evidence should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion * * *.

The Federal Circuit understood petitioner to be offering either of two possible readings of Section 3.307(b): that "*any* evidence submitted by the veteran showing manifestation of the claimed disability within the prescribed time is sufficient to gain the presumption of service connection" (Pet. App. 8), or that any *medical* evidence submitted by the veteran is sufficient to gain the presumption, *id.* at 9. The Federal Circuit found both of petitioner's interpretations insupportable because both would "deprive the Board of its authority to discount the weight and prob[a]t[ive value] of evidence in light of its own inherent characteristics and its relationship to other items of evidence." *Ibid.* The court concluded:

> [T]he Board in this case properly exercised its authority to assess the credibility and weight of the evidence before it, and did not clearly err when

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[5] The Federal Circuit's jurisdiction to review decisions of the CVA is limited to legal questions. 38 U.S.C. 7292(a) and (d)(2); see also Pet. App. 6-7.

> it held that [petitioner] has failed to demonstrate entitlement to a presumptive service connection for the claimed psychiatric disability.

Id. at 10.

ARGUMENT

The court of appeals' decision affirming the denial of service connection for a psychiatric disorder is correct and presents no issue warranting review by this Court.

1. The court of appeals correctly held that 38 C.F.R. 3.307(b) does not divest the Board of Veterans' Appeals of its "authority to discount the weight and prob[a]t[ive value] of evidence in the light of its own inherent characteristics and its relationship to other items of evidence." Pet. App. 9. Rather, the Board "is entitled independently to assess the quality of evidence before it." *Id.* at 10. That holding is consistent with the plain language of Section 3.307(b), which itself identifies some bases for the Board to reject evidence offered by claimants. Thus, Section 3.307(b) requires that medical evidence "should set forth the physical findings and symptomatology elicited by examination within the applicable period" and that lay evidence "should describe the material and relevant facts as to the veteran's disability observed within such period, not merely conclusions based upon opinion." 38 C.F.R. 3.307(b).

As the court of appeals pointed out, its ruling is also consistent with the traditional conception of the "inherent function[s] of the entity charged with responsibility for the determination of fact." Pet. App. 10. Congress's intent to entrust the Board with those traditional fact-finding functions is reflected in its decision to adopt the clearly erroneous standard of

review for CVA review of the Board's factual determinations. See 38 U.S.C. 7261(a)(4); cf., *e.g.*, *Inwood Labs., Inc.* v. *Ives Labs., Inc.*, 456 U.S. 844, 855 (1982) (noting that clearly erroneous standard of Fed. R. Civ. P. 52(a) "recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence").

Under petitioner's view, the Board would be required to accept any evidence submitted by a claimant as sufficient to establish the presumption of service connection, no matter how incredible that evidence was. The facts of this case illustrate the irrational results petitioner's view would produce. As the Board, the CVA, and the court of appeals all noted, petitioner's claim 14 years after the fact that he was treated for a psychiatric disorder in late 1976 was contradicted by two of his own earlier statements in the record, one from 1976 attributing his treatment to alcoholism, and one from 1987 stating that his first hospital admission for depression occurred in 1986. Pet. App. 9, 20, 27, 29, 31-32. All the reviewing bodies also noted that the 1990 statements by a physician were extremely vague and that all the particular facts in the statements appeared to be supplied by petitioner. *Id* at 9, 20, 32. Yet petitioner insists that the Board was required to disregard those considerations weakening the credibility of his evidence.

Moreover, as the court of appeals noted, petitioner's "proposed emasculation of the Board's inherent fact-finding authority" has no support in precedent, and indeed conflicts with

> the considerable body of law imposing a duty on the Board to analyze the credibility and probative

> value of evidence *sua sponte*, when making its factual findings. *See Goodsell v. Brown*, 5 Vet. App. 36, 42 (1993) (Board [improperly] failed to evaluate credibility and probative value of physicians' statements); *Culver v. Derwinski*, 3 Vet. App. 292, 297-98 (1992) (Board failed in its duty to include analysis of credibility or probative value of evidence in support of claim for service connection); *Miller v. Derwinski*, 3 Vet. App. 201, 204 (1992) (Board must assess credibility and weight of lay testimony).

Pet. App. 9-10.

Petitioner argues (Pet. 11) that the court of appeals' ruling conflicts with the "benefit of the doubt" standard embodied in 38 U.S.C. 5107(b). That standard provides:

> When, after consideration of all evidence and material of record in a case * * *, there is an approximate balance of positive and negative evidence regarding the merits of an issue material to the determination of the matter, the benefit of the doubt in resolving each such issue shall be given to the claimant. Nothing in this subsection shall be construed as shifting from the claimant to the Secretary the burden [of proof.]

Petitioner misconceives the role of the "benefit of the doubt" provision. That provision simply establishes the standard of proof claimants must meet, a standard slightly less demanding than the "preponderance of the evidence" standard, for claimants need only establish that "the evidence is in relative equipoise." *Gilbert* v. *Derwinski*, 1 Vet. App. 49, 54 (1991). The "benefit of the doubt" standard "does not apply during the process of submitting or gathering

evidence. The statute provides that it becomes an issue only '*after consideration* of all evidence and material of record.'" *Id.* at 55 (emphasis added). The standard is "similar to the rule deeply embedded in sandlot baseball folklore that 'the tie goes to the runner.'" *Ibid.* Thus, the standard only applies once the umpire, that is, the Board, after considering all the evidence, that is, after assessing the credibility and weight of the materials before it, determines that there is a tie that needs to be broken. The standard says nothing about the methods the Board should use in determining whether a tie in fact exists, that is, whether the "positive and negative evidence" is in "approximate balance." 38 U.S.C. 5107(b).

Petitioner also cites a number of decisions by the CVA and one decision by the Federal Circuit which he claims support his view of the reasonable doubt standard. See Pet. 11-12. In fact, not one of those decisions supports petitioner's contention. None of them directly addresses the issue presented here, namely, whether the Board has the authority to resolve questions of evidentiary credibility and weight. See *Layno* v. *Brown*, 6 Vet. App. 465, 469-471 (1994) (lay testimony competent only when it concerns the features or symptoms of an illness); *Ascherl* v. *Brown*, 4 Vet. App. 371, 378 (1993) (Board failed to fulfill its statutory duty to assist claimant in developing facts pertinent to his or her claim). Those that discuss that issue in the course of resolving other questions adopt the same position as the Federal Circuit. See *Cuevas* v. *Principi*, 3 Vet. App. 542, 547 (1992) (faulting Board for failing to "address the credibility of appellant's sworn testimony or provide reasons for discounting that testimony"); *Cartright* v. *Derwinski*, 2 Vet. App. 24, 26 (1991)

("The Board should have weighed and considered appellant's testimonial evidence and decided whether his testimony was credible."). Petitioner also mischaracterizes the court of appeals' decision in *Jensen* v. *Brown*, 19 F.3d 1413 (Fed. Cir. 1994). See Pet. 12. That case concerned statutory provisions, 38 U.S.C. 1153 and 1154, that are not at issue in this case.[6] Nor did *Jensen* address the issue of the Board's role in assessing the credibility and weight of evidence.[7]

2. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. Pointing to benefit programs for longshore and harbor workers, miners, and Social Security claimants, petitioner suggests that the Federal Circuit's interpretation of 38 C.F.R. 3.307(b) violates a widely applicable principle that, "when there is unrebutted evidence offered by a claimant, that evidence cannot be discounted unless there is affirmative

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[6] Section 1154(b) requires the Board to accept from combat veterans "satisfactory lay or other evidence" as sufficient to establish service connection even in the absence of contemporaneous official records supporting the claim. Even if that Section were applicable in this case, the Board would still have had to determine whether the proffered evidence was "satisfactory."

[7] Petitioner's characterization of his testimony is also misleading. He says he "was not testifying as to medical diagnosis or causation," but instead, was "testifying to the fact of his having received medical treatment." Pet. 12. That petitioner received medical treatment is not in dispute. The pertinent question is *why* petitioner received treatment shortly after service. Petitioner asserts that he was treated for a compensable psychiatric disorder. That is a matter of diagnosis, and lay persons are not competent to testify as to medical diagnoses or causation. See, *e.g.*, *Grottveit* v. *Brown*, 5 Vet. App. 91, 93 (1993).

evidence to the contrary." Pet. 9. Petitioner's contention is mistaken.

First, by referring to "unrebutted evidence," petitioner states the principle he attributes to other administrative agencies in a way that avoids confronting the issues at stake in this case. The question here is the authority of the Board to weigh evidence based on its lack of credibility, an issue addressed neither in the cases cited by petitioner nor in the general principle asserted by him. Also, while the Board discounted some of petitioner's evidence based on its internal characteristics, it also found some of that evidence—notably petitioner's own 1990 testimony—less credible because of its inconsistency with other record evidence. While that other record evidence does not directly "rebut" petitioner's testimony, it casts doubt on it in a way that petitioner's proposed general principle does not recognize.

Second, the decisions petitioner cites do not establish the general principle he claims possesses wide acceptance. Rather, they address a variety of particular statutory provisions establishing evidentiary presumptions of quite diverse types. In *Del Vecchio* v. *Bowers*, 296 U.S. 280 (1935), for example, this Court interpreted the presumption in the Longshoremen's and Harbor Workers' Compensation Act that, absent substantial evidence to the contrary, a death should be judged accidental rather than suicidal. The Court held that the presumption comes into play only "where there is an entire lack of competent evidence" supporting a determination of suicide. *Id.* at 286. In *Kerner* v. *Flemming*, 283 F.2d 916, 920-921 (2d Cir. 1960), the court simply remanded a denial of a disability claim, insisting that the Social Security Administration bore an obligation to assist the

claimant in collecting sufficient evidence to make the determinations concerning employability required by the statute. In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court upheld the constitutionality of a provision in the Federal Coal Mine Health and Safety Act stating that "no claim for benefits . . . shall be denied solely on the basis of the results of a chest roentgenogram [X-ray]." *Id.* at 31. None of those holdings supports the general principle urged by petitioner, let alone its applicability to a program—veterans benefits—not addressed in any of those decisions.

Third, under each of the benefit programs discussed by petitioner, courts have found, as the Federal Circuit found here concerning veterans' disability benefits, that the administrative finder of fact—typically an administrative law judge in the first instance—has both the authority and responsibility to determine whether claimants' evidence is credible and to determine the weight to be given particular items of evidence in light of other evidence. See, *e.g.*, *Schaal* v. *Apfel*, Nos. 96-6212 & 96-6316, 1998 WL 21886, at *4-6 (2d Cir. Jan. 23, 1998) (ALJ may assess credibility of Social Security claimant's testimony in light of her demeanor and work history); *Meehan Seaway Serv. Co.* v. *Director, OWCP*, 125 F.3d 1163, 1168-1169 (8th Cir. 1997) (ALJ's credibility determinations and considerations as to weight of evidence are not for court review in longshore cases), petition for cert. pending, No. 97-1032; *Pietrunti* v. *Director, OWCP*, 119 F.3d 1035, 1042 (2d Cir. 1997) (ALJ has discretion to evaluate credibility of longshore claimant and to arrive at independent judgment); *Underwood* v. *Elkay Mining, Inc.*, 105 F.3d 946, 949 (4th Cir. 1997) (ALJ considering claim for black-lung

benefits may make credibility determinations and weigh evidence presented); *Grant* v. *Shalala*, 989 F.2d 1332, 1336 (3d Cir. 1993) (Social Security ALJ required to make credibility determinations).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
SHARON Y. EUBANKS
JOHN J. HOFFMAN
Attorneys

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